BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHN HENRY Claimant VS.	)	
	)	Docket No. 208,226
POOL & PATIO SUPPLY, INC. Respondent AND	)	
CINCINNATI INSURANCE COMPANY Insurance Carrier	)	

ORDER

Claimant filed an Application for Review requesting Appeals Board review of a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on February 21, 1996 and a subsequent preliminary hearing Order entered on March 14, 1996.

ISSUES

The Administrative Law Judge denied claimant's request for preliminary compensation benefits finding that claimant's current need for medical treatment was a result of a subsequent intervening accident not related to his original work-related injury. This is the sole issue that is before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

When an intervening accident is alleged, the Appeals Board has jurisdiction to review a preliminary hearing order as it raises the issue of whether claimant's accidental injury arose out of and in the course of his employment with the respondent. *See* K.S.A. 44-534a(a)(2), as amended by S.B. 649 (1996).

Claimant sustained an injury to his neck in an automobile accident while working for the respondent on September 13, 1994. At that time, claimant was employed by the respondent as a laborer performing maintenance work on swimming pools. Respondent voluntarily provided medical treatment for claimant's work-related neck injury. Claimant's injury was first treated by physicians through a regimen of conservative medical treatment.

However, his symptoms of numbness in his left arm and headaches continued. Claimant was then referred to Dr. Mark Williamson, Jr., a surgeon in Kansas City, Kansas, in July of 1995. Dr. Williamson diagnosed a herniated cervical disc at C6-C7. On August 24, 1995 claimant underwent an anterior cervical discectomy and fusion with instrumentation performed by Dr. Williamson. Dr. Williamson's medical records and reports were admitted into evidence at the preliminary hearing and show that claimant was making good progress after surgery during a postoperative visit to Dr. Williamson on August 28, 1995.

However, claimant's postoperative recovery progress was dealt a setback by an incident that occurred sometime between claimant's visit to Dr. Williamson on August 28, 1995 and his subsequent visit on September 18, 1995. The claimant testified that sometime between these two dates, on a Friday night, he was attending a stock car race with a friend. Claimant testified that he was standing next to the grandstand watching the race when a girlfriend of his friend ran up, said “hi” and gave him a hug and a kiss on the cheek. When she hugged the claimant she placed her arms around the claimant's neck which placed the full weight of her body on his neck. Claimant established that the girl weighed approximately 95 pounds and was somewhere between 5 feet 2 inches and 5 feet 3 inches tall. Immediately, claimant felt a lump in his throat which he likened to a pulled muscle. Claimant indicated that his neck was symptomatic for a couple of days, but then seemed okay.

Claimant returned to Dr. Williamson for a regular scheduled postoperative visit on September 18, 1995. At that time, claimant related the race track incident to Dr. Williamson who then took x-rays of the claimant's surgically repaired neck. Dr. Williamson found that the C7 vertebra had been somewhat impacted and the lower screws had shifted downward into the C7 vertebra causing tilting of the plate and the titanium cage. After the x-ray examination, Dr. Williamson expressed his concern for the damage that had been done to claimant's neck but opined that if claimant could avoid further heavy trauma over the next 10 to 12 weeks, he would heal satisfactorily without the need of further intervention. Dr. Williamson then returned claimant to light-duty work with a 25-pound lifting limit.

After claimant returned to work, he became more symptomatic and finally was unable to perform his job duties for the respondent. Claimant's last day worked was October 30, 1995. Dr. Williamson saw the claimant again on October 25, 1995. After hearing claimant's complaints and examining the claimant, Dr. Williamson concluded a need for a second surgery. Dr. Williamson recommended the removal of the initial implant, vertebral body cordectomy of C7, anterior cervical discectomy of the C7-T1 intervertebral disc, extension of the implant and instrumentation to T1.

Claimant is requesting that Dr. Williamson be authorized to perform the second surgical procedure and for respondent to provide temporary total disability benefits from October 30, 1995, claimant's last day worked. The Administrative Law Judge, in denying claimant's request for compensation benefits, found that claimant's present need for surgery was due to the intervening incident that occurred at the race track and was not the direct and natural consequence of the work-related injury. Claimant argues, however, that his present neck condition and subsequent need for surgery is the direct and natural consequence of the original work-related injury.

Contained in Dr. Williamson's medical records is his opinion on the causal relationship of the original injury and the intervening incident to claimant's need for the

second surgery. Dr. Williamson opined that the second surgery would not have been needed, if the girl had not grabbed claimant around the neck at the race track. Dr. Williamson also opined that this incident would not have caused injury to a normal uninjured neck. He further opined that the incident at the race track occurred so early following the first surgery that the fusion had not had an opportunity to fully solidify. Dr. Williamson went on to opine that if the fusion had had the opportunity to solidify, that he would not have expected the incident at the race track to dislodge the instrumentation. It was Dr. Williamson's opinion that the race track incident would be considered a continuation of the original injury.

Accordingly, the medical evidence as presented by Dr. Williamson offers both an opinion that if the incident at the race track had not occurred, no further surgery would be necessary and if the claimant had not had the original surgery or if the original fusion from the surgery would have had the opportunity to solidify, no further injury would have occurred to claimant's neck and no further surgical intervention would be necessary. The parties, in their briefs, discuss two Supreme Court cases and one Court of Appeals case that address this issue. In Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973), the claimant injured his back while working for the respondent on January 9, 1970. Respondent provided medical treatment for the claimant's back injury and the claimant was released to return to work on April 17, 1970. On April 18, 1970, while at home, the claimant stooped over to pick up a tire and felt a sudden pain in his back. Two orthopedic surgeons testified in this case. One opined that claimant suffered a lumbosacral strain as a result of his accident at home. The other opined that claimant's injury at home was a continuation of his original work-related injury. The Court affirmed the trial court's decision that claimant had suffered a new injury which did not arise out of and in the course of his employment with the respondent based on substantial competent evidence in the record.

In another case, Gillig v. Cities Service Gas Co., 222 Kan. 369, 564 P.2d 548 (1977), the Supreme Court affirmed the district court's finding that the original injury was ultimately responsible for the surgery to claimant's knee and the present disability to claimant's leg. The claimant, in that case, originally injured his right knee while employed by the respondent in January of 1973. He received medical treatment from an orthopedic surgeon who released the claimant for regular duty. Claimant worked for the respondent until August 1973 at which time he resigned. In March 1975, while farming, claimant twisted his knee when he stepped from a tractor. Later the knee locked up on him as he was sitting watching television. Claimant was treated by the same orthopedic surgeon that saw the claimant for his injury in 1973. As a result of this incident, claimant underwent surgery for removal of the medial cartilage of his right knee. Claimant testified that he had experienced pain and a grinding sensation in his right knee from the time of his work-related injury of 1973 until the 1975 incident. The treating orthopedic surgeon testified that the claimant's knee was never right following the 1973 injury. He opined that the injury of 1973 necessitated the surgery in 1975. Another orthopedic surgeon examined the claimant after the 1975 surgery and opined that claimant's present injury and resulting surgery were the result of the 1973 incident.

The final case that the parties' briefs discuss, Graber v. Crossroads Cooperative Ass'n., 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982), is a common law tort action brought by a former employee against his former employer. In that case, the Court of Appeals reversed the district court's holding that the former employee's second injury was a direct and natural result of the employee's first work-related injury.

Therefore, the employee's claim against his previous employer was barred by the exclusive remedy provisions of the workers compensation act. The plaintiff, in that case, had an initial back injury and subsequent surgery and fusion while employed by the defendant employer. At the time of the second accident, the plaintiff's back had healed and the fusion had solidified. The second injury occurred after the plaintiff was on the former employer's premises on personal business when he slipped, caught himself and broke part of the fusion. The Court, in deciding that case, discussed both the Stockman and the Gillig cases. The Court explained, when discussing Gillig, that claimant's knee had never healed from the original injury. While the back sprain in Stockman had subsided. The Court of Appeals found that the plaintiff had sustained a new and separate accidental injury as the slip was a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back. *Id*. at 728.

After a review of the cases cited by the parties, and based on the preliminary hearing evidentiary record, the Appeals Board finds that the facts of this case are analogous to the Gillig case. The Appeals Board finds that claimant's present neck condition is the result of a nonsolidified fusion from the first surgery and an incident not out of the ordinary pattern of life. Accordingly, the Appeals Board finds that the claimant's present neck injury and need for surgical intervention is a direct and natural consequence of his original work-related injury. Therefore, the preliminary hearing Orders of Administrative Law Judge Steven J. Howard, dated February 21, 1996 and March 14, 1996 should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Orders of Administrative Law Judge Steven J. Howard dated February 21, 1996 and March 14, 1996, are reversed, and an order is entered by the Appeals Board finding that claimant's accidental injury arose out of and in the course of his employment with the respondent. The Appeals Board further orders this case remanded to Administrative Law Judge Steven J. Howard for appropriate findings based on the evidence contained in the preliminary proceedings in regards to claimant's request for medical treatment and temporary total disability benefits.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

I respectfully dissent from the opinion of the majority in the above matter. The medical evidence of Dr. Mark Williamson, Jr., is uncontradicted that claimant's second surgery would not have been necessary had claimant not been grabbed around the neck by a friend at a race track. This Board Member acknowledges that claimant's fusion had not had the opportunity to fully solidify, but does not feel it proper to saddle respondent with costs associated with additional surgery stemming from a nonwork-related injury, separate and distinct from the original work-related injury. The ruling in Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973), seems more analogous to the facts of this case. Therefore, I would respectfully submit the injury suffered by claimant at the race track did not arise out of and in the course of his employment with the respondent and benefits at the expense of the respondent for the additional surgery should be denied.

BOARD MEMBER

c: John G. O'Connor, Kansas City, KS
Anton C. Andersen, Kansas City, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director